

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LEROY TATE, JR.,

Petitioner,

v.

EDWARD BORLA, Warden,

Respondent.

Case No. 1:24-cv-00324-SKO (HC)

FINDINGS AND RECOMMENDATION TO
DISMISS SUCCESSIVE PETITION FOR
WRIT OF HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE

[TWENTY-ONE DAY OBJECTION
DEADLINE]

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He filed the instant petition in this Court on March 18, 2024. Because the petition is successive, the Court will recommend it be **DISMISSED**.

DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing § 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990). A petition for habeas corpus should not be dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

1 A federal court must dismiss a second or successive petition that raises the same grounds
2 as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive
3 petition raising a new ground unless the petitioner can show that 1) the claim rests on a new,
4 retroactive, constitutional right or 2) the factual basis of the claim was not previously
5 discoverable through due diligence, and these new facts establish by clear and convincing
6 evidence that but for the constitutional error, no reasonable factfinder would have found the
7 applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the
8 district court that decides whether a second or successive petition meets these requirements.

9 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by
10 this section is filed in the district court, the applicant shall move in the appropriate court of
11 appeals for an order authorizing the district court to consider the application." In other words,
12 Petitioner must obtain leave from the Ninth Circuit before he can file a second or successive
13 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must
14 dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave
15 to file the petition because a district court lacks subject-matter jurisdiction over a second or
16 successive petition. Burton v. Stewart, 549 U.S. 147, 152 (2007); Cooper v. Calderon, 274 F.3d
17 1270, 1274 (9th Cir. 2001).

18 Petitioner challenges his 2004 conviction in the Kings County Superior Court for second
19 degree murder. Petitioner previously sought federal habeas relief in this Court with respect to
20 the same conviction in Tate v. Knipp, Case No. 1:13-cv-00025-LJO-MJS. The petition was
21 dismissed with prejudice on September 25, 2013, as untimely. A habeas petition that is
22 dismissed as untimely constitutes an adjudication on the merits for successive purposes.
23 McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009).

24 The Court finds that the instant petition is second or successive under 28 U.S.C. §
25 2244(b). Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to
26 file his successive petition. Therefore, this Court has no jurisdiction to consider Petitioner's
27 renewed application for relief under 28 U.S.C. § 2254 and must dismiss the petition. See Burton,
28 549 U.S. at 157.

ORDER

Accordingly, the Clerk of Court is DIRECTED to assign a District Judge to this case.

RECOMMENDATION

For the foregoing reasons, the Court HEREBY RECOMMENDS that the petition be DISMISSED as successive.

This Findings and Recommendation is submitted to the United States District Court Judge assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within twenty-one (21) days after being served with a copy, Petitioner may file written objections with the Court. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.” The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: March 19, 2024

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE